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HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

October Term, 1952

No. 454

FRANK STONER AND IRENE STONER,
Petitioners,

against

CHARLES BELLOWS AND DOWNING & BELLOWS CO., LTD.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT OF PETITION

JACOB W. FRIEDMAN,
Attorney for Petitioners.

GEORGE H. T. DUDLEY,
of Counsel.

SUPREME PRINTING CO., INC., 41 MURRAY STREET, N. Y., BARCLAY 7-0349
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Supreme Court of the United States

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No.

———o———

FRANK STONER and IRENE STONER,
Petitioners,

v.

CHARLES BELLOWS and DOWNING & BELLOWS COMPANY, LTD.

———o———

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

This is an application by Frank Stoner and Irene Stoner for a writ of certiorari to review a judgment of the United States Court of Appeals for the Third Circuit, rendered May 21, 1952, which affirmed, in part, a judgment of the District Court of the Virgin Islands, Division of St. Thomas and St. John, at Charlotte Amalie, confirming a certain contract of sale in toto, evidence by two certain letters dated September 5 and November 14, 1950, entered into between petitioner Frank Stoner and defendant Downing & Bellows Company, Ltd.

Summary Statement

Through its president, Charles Bellows, defendant corporation offered to sell the retail department of its liquor business conducted in St. Thomas to petitioner on the following terms:

(a) Cash for existing stock;

(b) Cash for furniture and fixtures;

(c) 4% of gross sales for five years for the good will of the business, including use of the name of defendant corporation's president—"Bellows";

(d) Assignment of situs of the business to vendee and close co-operation of vendor to assist in development of the business so sold (Exhibit 2; R. 12).

By prearrangement the offer was to be submitted by plaintiff to the corporation for the purpose of formal acceptance by the stockholders (Exhibits 8 and 11; R. 26 and R. 28).

This proposition was adopted by affirmative vote of the holders of 60% of the capital stock—40% voting "nay" (Exhibit 39c; R. 51).

At the time of the sale the business was insolvent and had lost money on its operation for the two previous years of its existence as a corporation (Exhibits 39a, 39b; R. 44, R. 48).

Shortly after consummation of said sale plaintiff and defendants disagreed and defendants withdrew all cooperation, including use of the name "Bellows" in form previously agreed (Exhibits 17, 19, 20, 21, 22; R. 35, R. 36, R. 37; testimony of defendant Bellows, R. 81-83).

Thereupon plaintiff sued for breach of contract on the theory of fraud in the inducement and failure of consideration; prayed for modification of the contract in so far as compensation for the good will of the business was concerned and for general relief (Comp. R. 1).

At the trial, held before Honorable Herman E. Moore, District Judge, without a jury, plaintiff adduced the minutes of stockholders' meeting at which said proposed sale

was adopted by the owners of 60% of the capital stock (Exhibit 39c; R. 51) in support of plaintiff's contention that defendant Bellows had represented he owned or controlled the corporation, and that approval by the corporation of the understanding arrived at between them was a mere formality (testimony of Frank Stoner, R. 58-60; Irene Stoner, R. 65).

In the course of dispute with the Court over the competence of said evidence there ensued the following colloquy between the attorney for defendant and the Court (Tr. 95):

> "Mr. Young: (Attorney for Defendant) He made the inference that they had complete control of the corporation. All I want to bring out is that they do not have complete control of the corporation, for if they wanted to change the name they could not; so owning 60% of the business, could they sell part of it? That is the only question involved.
>
> "The Court: That is what they did here. That is the only question involved here, isn't that true?
>
> "Mr. Young: Yes, your Honor."

At the close of the trial the Court rendered its opinion immediately from the bench upholding said contract in toto and dismissing plaintiff's claim (Opinion, R. 87). Judgment in due course was entered thereon June 25, 1951 (judgment, R. 101).

Plaintiff appealed to the United States Court of Appeals for the Third Circuit and argued:

> (1) That said contract was divisible into
>
> (a) An agreement for sale of stock and and furniture and fixtures for cash; and
>
> (b) An agreement for sale of the good will of the business including use of name "Bellows" for 4% of gross sales for five years (Exhibits 8 and 11);

(2) That (a) might be sustained as a sale in the course of trade validly adopted by 60% of the voting stock of the corporation but that (b) was *ultra vires,* executory and void since sale of the good will of the business was in the nature of dissolution of the retail department, which could only be adopted by two-thirds vote of stockholders of the corporation as prescribed by statute (Code, Municipality of St. Thomas and St. John, Tit. 11, Chap. 26, s. 23, p. 72);

(3) That plaintiff's promise to pay 4% of gross sales for five years for good will of the retail business including use of the name "Bellows" and the cooperation of defendants was supported by no consideration now that said cooperation including use of name "Bellows" as agreed was withdrawn and it appeared that the corporation was insolvent (Plaintiff's Exhibits 17 [R. 35], 19, 20 [(R. 36], 21, 22 [R. 37], 39A [R. 44]).

(4) That except for sale of the stock and furniture and fixtures the terms of the contract were defective for uncertainty.

The appeal was argued as hearing *de novo* (*People of the Virgin Islands* v. *Price,* C. C. 3 (1950) 181 F. (2) 394, 397-98) on February 11, 1952, at Charlotte Amalie, St. Thomas, Virgin Islands, before Maris, Magruder and Staley, Circuit Judge, and in course of argument Staley, Circuit Judge, observed to counsel for appellant that contentions (1) and (2) were not before the District Court in the trial below; whereupon counsel referred to the colloquy and observation of the District Court aforementioned (App. 35a, 36a; Tr. 94-95) in support of appellant's contention that the question had been brought to the attention of the trial court.

As per opinion filed May 21, 1952, by Staley, Circuit Judge, said contention was disallowed as not having been presented to the Court below, and the judgment appealed

from herein was affirmed, except for the granting of injunction against plaintiff, not asked for by defendant, nor made out in the proof.

By successive orders of Mr. Justice Burton (R. 119), the time for filing the petition for certiorari has been extended to and including November 17, 1952.

Jurisdictional Statement

Petitioner applied for a rehearing, which was denied June 20, 1952.

Jurisdiction is invoked pursuant to 28 U. S. C. A. 1254(1) and Rule 38—5(b) of the rules of the Supreme Court.

Statutes and Rule Involved

Rule 54(c) Federal Rules of Civil Procedure—28 U.S.C.A.:

> "Demand for Judgment—Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled even if the party has not demanded such relief in his pleading".

Section 2106—Judiciary and Judicial Procedure—28 U. S. C. A.:

> "Determination—The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree or order of a court lawfully brought before it for review and may remand the cause and direct the entry of such appropriate judgment, decree or

order, or require such further proceedings to be had as may be just under the circumstances".[1]

Section 23, Chap. 26, Tit. II, Code of the Municipality of St. Thomas and St. John, page 72:

"Whenever in the judgment of the board of directors, it shall be deemed advisable and beneficial for such corporation that it should be dissolved, the board within twenty days after the adoption of a resolution to that effect by a majority of the whole board at any meeting called for that purpose of which meeting every director shall have received at least three days' notice, shall cause notice of the adoption of such resolution to be mailed to each stockholder, and also beginning with said twenty days cause a like notice to be published in a newspaper of general circulation published nearest to the place wherein the corporation shall have its principal place of business, at least four weeks successively, once a week, next preceding the time appointed for the same, of a meeting of the stockholders to be held at the office of the corporation, to take action upon the resolution so adopted by the board of directors, which meeting shall be convened between the hours of ten o'clock in the forenoon and three o'clock in the afternoon of the day so named and which meeting may, on the day so appointed by consent of a majority in interest of the stockholders present, be adjourned from time to time, for not less than eight days at any one time, of which adjourned meeting notice by advertisement in said newspaper shall be given; and if at any such meeting two thirds in

[1] For nature of review of decisions of the District Court of the Virgin Islands of the United States in the United States Court of Appeals for the Third Circuit see *People of the Virgin Islands* v. *Price*, C. C. 3 (1950) 181 F. (2) 394, 397-98.

interest of all the stockholders shall consent that a dissolution shall take place and signify their consent in writing, such consent, together with a list of the names and residences of the directors and officers, certified by the president and the secretary or treasurer, shall be filed in the office of the Government Secretary who upon being satisfied by due proof that the requirements aforesaid have been complied with, shall issue a certificate that such consent has been filed and the board of directors shall cause such certificate to be published four weeks consecutively, at least once a week, in a newspaper of general circulation''.

Questions Presented

1. May a claimant, on appeal in the nature of a trial *de novo,* request relief on facts proved at the trial on a theory not specifically argued in the court below?

2. Does failure to comply with statutory provisions affecting the execution of a contract constitute such a material breach as would warrant holding the parties discharged of obligations of such contract?

Reasons for Granting Writ

The writ should be granted because

(a) The decision of the United States Court of Appeals for the Third Circuit in this case is in conflict with the accepted interpretation of Rule 54(c) of F. R. C. P.— 28 U. S. C. A.— in the 10th Circuit—*Schoonover* v. *Schoonover* [C. C. A. 10 (1949)] 172 F. (2) 526-530; in the 2nd Circuit—*Gins* v. *Mauser Plumbing Supply Company* [C. C. A. 2 (1945)] 148 F. (2) 974, 976; in the District of Columbia—*Michael Delbalso, Inc.* v. *Carozza* [U. S.

App. D. C. (1943)] 136 F. (2) 280-281; and of this Court in *Hormel* v. *Helvering* (1941), 312 U. S. 552, 558.

(b) The Court's decision sanctions a mode of snap judgment by the District Court of the Virgin Islands without adequate reflection or deliberation that is prejudicial to the interest of claimants and which requires the exercise of the supervisory powers of this Honorable Court.

WHEREFORE, your petitioners pray that a writ of certiorari issue to the United States Court of Appeals for the Third Circuit commanding said Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and all proceedings of said Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court; that the judgment of the said Court of Appeals may be modified as justice may require; and that petitioners may be granted such other, further and different relief as may seem just and proper in the premises.

Dated: New York, N. Y., November 14, 1952.

FRANK STONER and IRENE STONER,
Petitioners,

By JACOB W. FRIEDMAN,
Counsel for Petitioners.

GEORGE H. T. DUDLEY,
of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Opinion Below

In the Circuit Court of Appeals for the Third Circuit the opinion was written by Judge Staley and filed under date of May 21, 1952. The opinion has apparently not yet been officially reported.

Grounds for Jurisdiction

Petitioner applied for a rehearing, which was denied by the Circuit Court of Appeals for the Third Circuit June 20, 1952.

Jurisdiction is invoked pursuant to 28 U. S. C. A. 1254(1) and Rule 38—5(b) of the rules of this Honorable Court.

Statement of the Case

We repeat the summary statement, as set forth in the petition:

Through its president, Charles Bellows, defendant corporation offered to sell the retail department of its liquor business conducted in St. Thomas to petitioner on the following terms:

(a) Cash for existing stock;

(b) Cash for furniture and fixtures;

(c) 4% of gross sales for five years for the good will of the business, including use of the name of defendant corporation's president—"Bellows";

(d) Assignment of situs of the business to vendee and close co-operation of vendor to assist in development of the business so sold (Exhibit 2, R. 12).

By prearrangement the offer was to be submitted by plaintiff to the corporation for the purpose of formal

acceptance by the stockholders (Exhibits 8 and 11; R. 26 and R. 28).

This proposition was adopted by affirmative vote of the holders of 60% of the capital stock—40% voting "nay" (Exhibit 39c; R. 51).

At the time of the sale the business was insolvent and had lost money on its operation for the two previous years of its existence as a corporation (Exhibits 39a, 39b; R. 44, R. 48).

Shortly after consummation of said sale plaintiff and defendants disagreed and defendants withdrew all cooperation, including use of the name "Bellows" in form previously agreed (Exhibits 17, 19, 20, 21, 22; R. 35, R. 36, R. 37; testimony of defendant Bellows, R. 81-83).

Thereupon plaintiff sued for breach of contract on the theory of fraud in the inducement and failure of consideration; prayed for modification of the contract in so far as compensation for the good will of the business was concerned and for general relief (R. 1).

At the trial, held before Honorable Herman E. Moore, District Judge, without a jury, plaintiff adduced the minutes of stockholders' meeting at which said proposed sale was adopted by the owners of 60% of the capital stock (Exhibit 39c; R. 51) in support of plaintiff's contention that defendant Bellows had represented he owned or controlled the corporation, and that approval by the corporation of the understanding arrived at between them was a mere formality (testimony of Frank Stoner, R. 58-60; Irene Stoner, R. 65).

In the course of dispute with the Court over the competence of said evidence there ensued the following colloquy between the attorney for defendant and the Court (Tr. 95):

> "Mr. Young: (Attorney for Defendant) He made the inference that they had complete control

of the corporation. All I want to bring out is that they do not have complete control of the corporation, for if they wanted to change the name they could not; so owning 60% of the business, could they sell part of it? That is the only question involved.

The Court: That is what they did here. That is the only question involved here, isn't that true?

Mr. Young: Yes, your Honor."

At the close of the trial the Court rendered its opinion immediately from the bench upholding said contract in toto and dismissing plaintiff's claim (Opinion, R. 87). Judgment in due course was entered thereon June 25, 1951 (judgment, R. 101).

Plaintiff appealed to the United States Court of Appeals for the Third Circuit and argued:

(1) That said contract was divisible into

(a) An agreement for sale of stock and furniture and fixtures for cash; and

(b) An agreement for sale of the good will of the business including use of name "Bellows" for 4% of gross sales for five years (Exhibits 8 and 11);

(2) That (a) might be sustained as a sale in the course of trade validly adopted by 60% of the voting stock of the corporation but that (b) was *ultra vires,* executory and void since sale of the good will of the business was in the nature of dissolution of the retail department, which could only be adopted by two-thirds vote of stockholders of the corporation as prescribed by statute (Code, Municipality of St. Thomas and St. John, Tit. II, Chap. 26, s. 23, p. 72);

(3) That plaintiff's promise to pay 4% of gross sales for five years for good will of the retail busi-

ness including use of the name "Bellows" and the co-operation of defendants was supported by no consideration now that said co-operation including use of name "Bellows" as agreed was withdrawn and it appeared that the corporation was insolvent at the time of the sale (Plaintiff's Exhibit 17 [R. 35], 19, 20 [R. 36], 21, 22 [R. 37], 39A [R. 44]);

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As per opinion filed May 21, 1952, by Staley, Circuit Judge, said contention was disallowed as not having been presented to the Court below, and the judgment appealed from herein was affirmed, except for the granting of injunction against plaintiff, not asked for by defendant, nor made out in the proof.

Assigned Errors

1. The Court erred in refusing to consider the questions of (a) divisibility of the contract, and (b) invalidity of clauses 4, 5, and 6 of the contract.

2. The Court erred in affirming that part of the contract purporting to transfer good will, not adopted in manner prescribed by ordinance of the district.

Argument

1. A party should receive such relief as his pleadings plus the evidence adduced at the trial before the Court entitles him to.

Rule 54(c) F. R. C. P., 28 U. S. C. A.;
Hormel v. *Helvering* (1941) 312 U. S. 552, 58;
Schoonover v. *Schoonover,* C. C. A. 10 (1949) 172 F. (2) 526, 530;
Gins v. *Mauser Plumbing Supply Co.,* C. C. A. 2 (1945) 148 F. (2) 974;
Michael Delbalso Inc. v. *Carozza,* U. S. App. D. C. (1943) 136 F. (2) 280, 281.

2. The contract is divisible (Exhibits 8 and 11; R. 26, 28). Where considerations for the several parts of a contract are expressly apportioned, the contract is severable.

Lewis v. *Seabury,* 74 N. Y. 409, 30 A. R. 311;
Pacific Wharf & Storage Co. v. *Standard Dredging Co.,* — Cal. — 192 P. 847.

3. So much of the contract as stipulates sale of stock, furniture and fixtures for an agreed price is severable and valid as a sale in the course of trade.

Articles of Incorporation, R. 7;
Maben v. *Gulf Coke & Coal Co.,* 173 Ala. 259, 55 So. 607, 35 L. R. A. (N. S.) 396;
Jeppi v. *Brockman Holding Co.* (34 Cal. (2) 10), 206 P. (2) 847, 9 A. L. R. (2) 1297.

4. The good will of a business has no monetary value merely because it is a going concern.

Ryerson & Son v. *Peden,* 303 Ill. 171, 135 N. E. 423, 24 A. L. R. 1273, 79;
Ahlenius v. *Bunn & Humphreys,* 358 Ill. 155, 192 N. E. 824, 95 A. L. R. 913, 918, 921;
Camden v. *Stuart,* 144 U. S. 104, 36 L. Ed. 363, 366-67.

5. Right to use the name of a vendor is no part of the good will of a business.

Armington v. *Palmer,* 21 R. I. 109, 42 A. 308, 79 A. S. R. 786;
Vonderbank v. *Schmitt,* — La. Ann. — 10 So. 616, 15 L. R. A. 462;
Hilton v. *Hilton,* — N. J. — 104 A. 375, L. R. A. 1918 F. 1174.

6. In absence of dissolution, a corporation may not convey the right to use either its name or the name of one of its stockholders constituting part of its corporate title over the protest of a stockholder.

Armington v. *Palmer, supra;*
Holmes B. & H. v. *Holmes, B. & A. Mfg. Co.,* 37 Conn. 278, 9 A. R. 324;
Le Page v. *Russia Cement Co.,* 51 F. 941, 17 L. R. A. 364;
Re Brown, 242 N. Y. 1, 150 N. E. 581, 44 A. L. R. 510.

7. In absence of dissolution, majority stockholders may not sell so much of corporate property as to preclude continuation of the business for which it was created and the carrying out of the purpose of its formation, over the protest of a stockholder.

Articles of Incorporation, R. 7;
Code, Municipality of St. Thomas & St. John,

Tit. II, c. 26, s. 23, p. 72;
Hunt v. *Am. Grocery Co.*, 81 F. 532;
Re Timis, 200 N. Y. 177, 93 N. E. 522.

8. An executory, *ultra vires* contract may be disaffirmed by either party; and repudiation by one of the parties is valid ground for abandonment by the other.

Bowman Dairy Co. v. *Mooney*, 41 Mo. App. 665;
Central Transportation Co. v. *Pullman*, 139 U. S. 24, 35 L. Ed. 55, 63;
Lake Shore & M. S. R. Co. v. *Richards*, 152 Ill. 59, 38 N. E. 773, 30 L. R. A. 33, 53.

It is apparent that the case involves substantial questions concerning the validity of the contract with regard to the sale of the good will of defendant corporation; that plaintiffs' rights have not been justly adjudicated; and that the decision of the Court of Appeals and the procedure adopted herein are in conflict with the established law in other circuits.

CONCLUSION

For the reasons stated in the petition and in this brief, it is respectfully submitted that the application for a writ of certiorari should be granted.

Dated: New York, N. Y., November 14, 1952.

Respectfully submitted,

JACOB W. FRIEDMAN,
Counsel for Petitioners.

GEORGE H. T. DUDLEY,
of Counsel.